[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF ENACTMENT No. 10 of 1922, THE JUDGMENTS (RECIPROCITY) ENACTMENT.

HO HONG BANK LTD. vs. HO KAI NEO & ANOTHER.

[JOHORE MISCELLANEOUS APPLICATION No. 53]

[JOHORE CIVIL APPEAL No. 6 OF 1931]

Reciprocal Enforcement of Judgment by Registration—Default of appearance in Original Suit—history of legislation—Enactment No. 10 of 1922, The Judgments (Reciprocity) Enactment, S. 3.

A Judgment of a foreign Court of competent jurisdiction, obtained in default of appearance, against the defendants who were ordinarily resident in the foreign country, can be registered in the Supreme Court of Johore under the Judgments (Reciprocity) Enactment of 1922.

Per SPROULE, J.—A Judgment holder is entitled under the Enactment and Rules to a provisional order for registration of his Judgment as a matter of course and the onus is shifted to the judgment debtor to assail the registration later.

The words "the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original Court" and the words "did not appear ....." appearing in Clause (c) of Section 3 (2) of the Enactment should be read conjunctively and not disjunctively.

Per TERRELL, J.—When once the fact is established that the foreign Court had jurisdiction to try and determine the original action, it is immaterial to consider whether the original Writ was served by substituted service or whether appearance was entered or not.

This was an appeal from the decision of Thorne, J., made in Chambers on an *ex parte* application under the Judgments (Reciprocity) Enactment of 1922 by the appellants, the Ho Hong Bank, Limited, for leave to register in the State of Johore a Judgment obtained by them against Ho Kai Neo and Chew Swee Lim in Singapore Suit No. 679 of 1931. The learned Judge refused the application and certified no further argument.

Charlesworth, for the Appellants.

Cur. Ad. Vult.

5.1.32

SPROULE, J.—The plaintiff applied *ex parte* by summons under the Reciprocal Enforcement of Judgments Enactment for leave to register in Johore, the default judgment for a money debt obtained by him against the defendants in the Supreme Court at Singapore.

Plaintiff could have applied without process by merely producing his office copy or exemplification of judgment, although in such cases a summons may be directed to be filed.

If the application had been granted, the registration would have been provisional. An order *nisi* would have had to be served on the defendant, and time and opportunity given to him to show cause, if so advised, why final registration should not be allowed.

Section 3 (2) of the Enactment sets out the grounds upon which a judgment debtor could found such opposition. At this stage I content myself with saying that these grounds are a resume of the well-settled defences to which a debtor is restricted in a suit to enforce a foreign judgment.

In my view, a judgment holder is entitled under the Enactment and Rules to his provisional order as a matter of course, and an onus is cast upon the debtor to assail registration later, he having already suffered judgment in the original Court. In our case the burden was in fact thrown upon the judgment creditor, instead, to support his judgment and not as against his debtor, but against the Court. With great respect, I do not think the Court would be justified in so acting except in some such extreme case as that the foreign judgment was so manifestly incompetent as to render the application on the face of it an abuse of the process of the Court.

In our case the point raised by the Court, so far from being manifest, was very debatable. The Singapore writ had been served by substituted service; but no argument was based upon that; and indeed, the Johore Court could have solved any such argument by insisting upon personal service of the provisional order. The sole ground taken by Thorne, J., in refusing the application was that, by reason of clause (c) of Section 3 (2) of the Enactment, no default judgment is capable of registration.

The history of reciprocal enforcement of judgments between different parts of His Majesty's dominions and protectorates is recent. Until 40 Geo. III c. 90, a Scottish or Irish judgment could only be enforced in England (and *Vice Versa*), like any other foreign judgment, by a suit. That cause of action still survives, and has come to be regulated by well settled common law principles. A foreign judgment is treated as creating obligation and agreement compelling the defendant to pay the judgment debt. He is only allowed to assail its validity upon certain restricted grounds.

The Statute of George III in 1800 was the first attempt to facilitate the enforcement in one part of the United Kingdom of the decrees of the Courts of another. The machinery was that of exemplification and is still employed to enforce judgments more complicated than those for debts, damages, or expenses dealt with in the later Legislation of 1868 and 1920.

The Judgments Extension Act of 1868 first introduced the machinery of registration of money judgments as between England, Scotland and Ireland. That machinery was extended by Part II of the Administration of Justice Act, 1920, to the Empire at large, provided that each Dominion, Colony or Protectorate seeking admission into this comity, should first pass reciprocal legislation upon the same lines. Hence the Johore Enactment now in question.

Now I have studied a great number of cases, but do not propose to state here any more than the bare result of such research, of the correctness of which I am convinced. Study shews, as logic demands, that the same principles which apply to a suit upon a foreign judgment, affirming its validity and restricting the defences available in answer to it, have been applied to applications under the Acts of 1800 and 1868; and that these principles are embodied in the Act of 1920, and in the Johore Enactment which faithfully follows its drafting. The defences set out in Section 3(2) are those to which defendants in a suit on a foreign judgment and debtors in applications under the Acts of 1800 and 1868 are all limited. That is not only true but logical, since the cause of action is throughout the same, and only the procedure and machinery of enforcement differ.

I collect from the text-books and set out below in my own language, the only defences available in a suit upon a foreign judgment. These are:

(1) that the foreign Court was not competent or exceeded its jurisdiction.

(2) that the judgment debtor was not subject to the jurisdiction of the foreign Court and did not waive or cure that defect (*e.g.* by being a willing plaintiff: or by voluntary appearance, if a defendant).

(3) breach of the elementary rules of natural justice.

Note (a) This defence is only open to a debtor who was defendant, not plaintiff, in the foreign Court.

Note (b) Such a debtor may raise this defence notwithstanding that he was (by residence or conduct or otherwise) subject to the jurisdiction of the foreign Court, unlike the debtor in rule (2) *supra*.

(4) that the foreign judgment had been obtained by fraud.

(5) that the foreign judgment was not final.

(6) that the foreign judgment was against public policy or otherwise similarly objectionable to the rules of the Court of enforcement.

I believe that these defences are faithfully reproduced, in the same order, but in different language, in clauses (a) to (f) of Section 3 (2) of the Enactment. Regarding my rules (1), (4) & (6), that proposition cannot be questioned. Nor indeed regarding my rule (2). But the affirmative of this negative defence of "non-jurisdiction" in clause (b) has by the draftsman of Section 3 (2) been introduced into clause (c), and, if I may say so, in its wrong order. I think, with respect, that confusion may thus have been caused in the mind of the trial Judge, and led him to miss the true effect of the clause. I set out the two clauses forthwith:—

> 3 (2) No judgment shall be ordered to be registered under this section if
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court; or
>
> (c) that judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original Court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that Court or agreed to submit to the jurisdiction of that Court.

Now I think that if (b) and (c) are thus read in conjunction, as they ought to be, then the words from "notwithstanding" to the end of clause (c) clearly refer back to clause (b); and the draftsman would have made that clearer if words, clearly comprising a protasis, had been placed earlier in the clause. That is, if he had said, in effect, (c) a defendant (not a plaintiff) in the original proceedings, "even if he cannot plead" non-jurisdiction under clause (b), can still set up natural "justice....."

As regards clause (b), thus incorporated by reference into clause (c), it is a skilful digest of the principles laid down by Lord Blackburn in delivering the judgment of the Court in *Schibsby* v. *Westenholz*, reported in L.R. 6 Q.B. 155 at p. 161. To avoid inordinate length, I refrain from quoting here from that report. But I propose to set out the relevant passages in a note or schedule to this judgment. My reasons are that a clear understanding of clause (b) must be involved in a clear understanding of clause (c), the critical clause (or one of the critical clauses) of section 3 (2) for the purposes of the present appeal. Again, that case was of a suit based upon a foreign judgment by default. It was, moreover, a case in which a defendant, who, although not duly served, yet had notice of the proceedings in the French Court, and an opportunity of attending and being heard, yet refused by so doing to render himself subject to the jurisdiction of the French Court. That judgment will also explain how clause (b) may just possibly provide a good defence to a debtor, whether plaintiff or defendant, who is compelled against his will to resort to the foreign Court in defence of property of his within the control of the foreign Court and in jeopardy.

I summarize my views. The Court applauds a diligent creditor and will not hamper him. If he has pursued his debtor to judgment elsewhere, the Court will accept and respect that judgment and assist him to enforce it. It will not suffer the whole matter to be reopened and re-heard except only in certain limited cases, the burden of establishing which will be upon the defendant who suffered the judgment. Lack of jurisdiction is fundamental and the first of such exceptions. But even if the jurisdiction of the original Court cannot be assailed, the debtor may still set up such matters as natural justice, fraud, non-finality, or public policy. All exceptions must be strictly construed and scrutinised. Section 3 (2) means that final registration will only be refused if the

defendant can establish beyond reasonable doubt one of the exceptional and limited causes above defined.

If I am right, then this application was approached and regarded from a totally mistaken point of view. The interests of the judgment creditor, not of the judgment debtor were entitled to the sympathy and assistance of the Court. Construction if ambiguous or dubious, should have leaned in the Applicant's favour and not against him.

Then as to the construction placed upon clause (c) in the judgment under appeal, I do not propose to touch further upon the findings based upon words merely excluding clause (b), and, in my view, in no way intended to restrict any right of the judgment creditor. Restrictions under the Enactment and Rules are aimed not against him but against the debtor who has already suffered judgment in a competent Court. The main argument in the judgment, however, is based upon construction of the words:

> was not duly served with the process of the original Court and did not appear....

In my opinion, even by the bare technical rules of mere construction, the judgment is wrong. There are two things mentioned in clause (c), (1) non-service, (2) non-appearance, and they are connected by the conjunction "and," without even a comma in between. Unless the context requires it, or good reason requires it, "and" must be conjunctive and not be held to be used disjunctively and as meaning "or." The learned Judge reads these critical words as expressing two separate and distinct defences whereby registration might be defeated. That is, he reads "and" as meaning "or"; and he has held, accordingly that *either* non-service *or* non-appearance, despite service, is a sufficient ground for refusing registration. But there is nothing in the context nor in good sense, requiring such disjunction. Clause (b) and the judgments in *Schibsby* v. *Westenholz* recognize that there could be (a) non-service and non-appearance or (b) non-service and yet appearance. Everyday practice shews that a person, unserved, may yet appear and take part in litigation. It is not a new conception nor repugnant to experience or good sense. A partner may easily come to hear indirectly that his co-partner has been sued, and may come forward and voluntarily join in the litigation in order to defend his own or the firm's interest. Or a beneficiary, unserved, may yet come forward and apply to be joined as a party or be given leave to attend the proceedings in an action in Chancery. Such interveners (if afterwards involved in liability) obviously cannot be allowed to set up non-service alone as affording them a defence against final registration by reason of clause (c). By conduct they have waived non-service. There seems to be no reason arising only out of the rules of construction why the words of clause (c) should be held to allow a judgment debtor two, instead of one, grounds for objection (the onus of proving which was upon him) against final registration.

Non-service, therefore, if waived by subsequent intervention or appearance, quite clearly cannot protect a debtor from avoiding paying his debt or resisting execution and enforcement of the judgment against him by opposing registration.

It seems to me that you cannot have it both ways. If non-service, *per se*, is no defence against registration because this defect might be cured or waived by subsequent appearance or intervention; then non-appearance by itself, and even after service, cannot, as a matter of construction alone, constitute any good ground for refusal of registration. The clause therefore requires a conjunction of (a) non-service, *plus* (b) non-appearance; or, to make it clearer, non-service, not caused or waived by subsequent appearance or intervention.

The same conclusion may be arrived at by the *argumentum ad absurdum*. An honest Singapore debtor, not pretending to question the claim, allows judgment to go against him by default. He has property in Johore, and the judgment creditor applies in Johore for registration. Without waiting to hear if, after due service and proper notice, the debtor has any possible objection to urge, the Johore Court says "Not so. You may have served him, and he admitting your claim may have deliberately let judgment go by default. But although he may not thereby have meant to defraud you, the

law of Johore will do it for him, and defeat his honesty by going out of its way, without hearing what he has to say, to refuse even an order *nisi* for provisional registration."

Such a combination of circumstances can very easily arise, if the order under appeal is right, and it may result in a travesty of justice, against the will and intention of an honest defendant. And similarly, a dishonest Singapore defendant, who has property in Johore, can defeat a just claim by the simple expedient of not entering appearance to a Singapore suit served upon him.

I think also that if the learned Judge relied upon any doubt of the finality of a judgment by default, his order was not justified upon that ground. Some of the text-books still postulate as one test of finality that a judgment must not be one which the Court making it can afterwards revise, and on that ground express doubt whether a judgment by default is a final judgment.

That test appears to be contrary to the trend of modern opinion. I am not going into the matter at length. But no such test, I think, can, in any case, be applied to a Singapore judgment. We still retain in Singapore, preserved by Sections 541 *et seq.* of the Civil Procedure Code, the power of a trial judge to order a new trial and hear it himself. If the test of finality is that the Court of trial has no power to revise the judgment, then no Singapore judgment, whether by default or after trial, is final or can be enforced in Johore.

The more accurate and accepted test of finality is defined on p. 21 of the Annual Practice, namely, whether the judgment could be pleaded by way of estoppel by *res judicata*. It is well-established that, in so far as the objection to pay the decreed amount goes, a judgment by default satisfies that test. Fitzgibbon, L. J. delivering the judgment of the Irish Court of Appeal in *Irish Land Commissioners* v. *Ryan* (1900)2 I. R. 565 says at p. 572

> That a judgment by default has an operation by estoppel cannot be denied..... In the present case it may be admitted that the judgment of June 30, 1891, estopped the then defendants from denying that the amount for which that judgment was given.....was then due by them to the plaintiffs.

It is reasonably clear, then, that you may sue upon a foreign judgment by default of appearance after service and not fear any defence of "Non-finality." The Judgments Extension Act of 1868 enforces judgments by default as of course—see Annual Practice and the note under Order 42 rule 28 under the heading "service of Proceedings" on p. 767. I do not propose to dwell upon the point, but it will be observed that in such cases as *Turnbull* v. *Walker* 67 L.T. 767 and others I can cite, no attempt was made to raise this easy defence of non-finality by reason of the judgment having been entered by default.

The best modern opinion as to the finality of a judgment is crystallized in clause (e) of Section 3 (2), where it says

> the judgment debtor satisfies the registering Court either that an appeal is pending or that he is entitled and intends to appeal against the judgment.

In my opinion, therefore, the order appealed from was wrong. An order *nisi* for provisional registration should have been granted as of course. Section 3 (2) applies to final registration, thereafter, giving the judgment debtor certain restricted grounds upon which he could assail the competence or correctness of the Judgment of the Supreme Court of the Colony in avoidance of final registration. These were not the concern of the Johore Court upon the original *ex parte* application for provisional registration. But even if they were, then the learned Judge in the Court below was wrong in his construction of Section 3 (2) in general or its clause (c) in particular; and if indeed he relied upon any theory of non-finality of a judgment by default, then he was again wrong.

I think our order should be that an order *nisi* should be made for provisional registration, to be served upon the defendant, with three weeks allowed to the defendant thereafter in which to oppose final registration upon any such ground, permitted by Section 3 (2), as he may be advised.

SCHEDULE.

Being an extract from the judgment of the Court delivered by Lord Blackburn in *Schibsby* v. *Westenholz*, L.R. 6, Q.B. 155, beginning at p. 161.

Now some things are clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think its laws would have bound them.

If at the time the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of the country bound them.....

Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him. And, later on, this:—

We think it better not to.....express an opinion as to the effect of appearance of a defendant when it is so far not voluntary that he only comes in to try and save some property in the hands of a foreign tribunal. But we must observe that the decision in *Brissac* v. *Rathbone* is an authority that when a defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound.

TERRELL, J.—The Appellants, the Ho Hong Bank, Limited, sought to register in Johore a judgment obtained by them in Singapore (Civil Suit No. 679 of 1931) against Ho Kai Neo and Chew Swee Lim. The application was made under the provisions of Enactment, No. 10 of 1922, the Judgments (Reciprocity) Enactment, and was heard in chambers by Thorne, J. who refused the application and certified that he required no further argument.

In his grounds of judgment the learned judge refers to a previous judgment delivered by him on the 30th May, 1931, in Miscellaneous Application No. 25 of 1931 between *M. R. K. A. K. M. Chettiar* v. *Teong Eng & Co. and another*. The latter application was also an application to register a judgment obtained in Singapore. The short ground of judgment in each case was that the defendant not having entered an appearance in the Singapore proceedings the judgment could not be registered in Johore.

The material portion of the Enactment is Section 3. Sub-section 2 (c) of this Section reads as follows:—

> "No judgment shall be ordered to be registered under this section if.....(c) the judgment debtor being the defendant in the proceedings, was not duly served with the process of the original Court, and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that Court, or agreed to submit to the jurisdiction of that Court."

In the present case the record did not show whether the defendant had appeared or not, but the learned judge elicited from counsel for the appellants that the order made in Singapore on 10th July 1931 was made in default of appearance. This appears to me to be irrelevant. The Rules made in pursuance of the Enactment provide for the kind of affidavit to be filed in support of the application. The affidavit of Yeo Tiam Siew, p. 3 of the record, complies with Rule 2 in stating *(inter alia)* that the defendants resided at 43 McCullum Street, Singapore, and that the judgment did not fall within any of the cases in which under Section 3 (2) of the Enactment a judgment cannot properly be ordered to be registered. In my opinion therefore the appellants were entitled to an order giving them leave to register the judgment.

It was however held by the learned trial judge that Section 3 (2) (c) makes it clear that a defendant must not only have been served but must have appeared and that as counsel had admitted that the judgment was a default judgment the Court had no jurisdiction to make the

order asked for. As stated above, the Rules do not require the applicant in the first instance to state that the defendant has both been served and has appeared. If that is the meaning of Section (3) (2) (c), then there was *prima facie* evidence that the defendants had both been served and had appeared and I do not think it was for the Court to question counsel when the procedure laid down had been scrupulously followed.

In my view however, section 3 (2) (c) does not require that a defendant should both have been served and should have appeared. The section deals with three classes of defendants:

(1) Those ordinarily resident within the jurisdiction;

(2) Those carrying on business within the jurisdiction;

(3) Those who have agreed to submit to the jurisdiction.

The sub-section appears to me to mean that such defendants must either be served *or* must have appeared, and that both conditions do not require to be fulfilled. By way of contrast subsection 3 (2) (b) which deals with the case of defendants not ordinarily resident or carrying on business within the jurisdiction, disregards the question of service because service by itself does not confer jurisdiction. In such cases jurisdiction is only obtained by the defendant submitting or having agreed to submit thereto.

I am fortified in this conclusion by the practice of the Courts in England in enforcing foreign judgments. It is well settled that English Courts will not recognise as conclusive a judgment of a Court (a) which had not competent jurisdiction, or (b) where the procedure was irregular or the judgment improperly obtained, or (c) which was contrary to natural justice. Leaving aside (b) and (c), the Courts in England consider that foreign Courts have jurisdiction and that a defendant is bound in the following cases:—

(1) Where he is a subject of the country in which the judgment has been obtained;

(2) Where he was resident in the country when the action began;

(3) Where he has submitted to the jurisdiction either in the character of plaintiff or by voluntary appearance as defendant;

(4) Where *ex contractu* he has agreed to submit to the jurisdiction;

and in certain other cases. (See *Schibsby* v. *Westenholz*, L.R. 6 Q.B., p. 155).

Section 3 (2) (a), (b) and (c) of the Enactment provides that no judgment shall be registered in certain specified cases which may be summarised as follows:

(a) Where the Court had no jurisdiction;

(b) Where the defendent not being ordinarily subject to the jurisdiction has not submitted or agreed to submit to it; and

(c) Where the defendant though ordinarily subject to the jurisdiction has not been served and has not appeared.

It will be seen that these three sub-sections (a), (b) and (c) cover exactly the same ground as the rules 1 to 4 which have been held to give a foreign Court jurisdiction so as to enable the judgment of such foreign Court to be enforced by action.

It is a question therefore whether the Court in Singapore had jurisdiction, and if the defendants were resident in Singapore there is no doubt that it had. When once that fact is established it is immaterial to consider whether the original writ was served by substituted service or whether appearance was entered or not. "*Omnia rite esse acta praesumuntur*" and quite apart from any personal knowledge of Singapore procedure, the Court in Johore should presume that the judgment obtained in Singapore was a binding judgment properly obtained.

I would therefore direct that leave should be granted to register the judgment and that the defendants have three weeks after service upon them of notice of the registration to apply to set the registration aside.

Appeal allowed.

Solicitors for the Appellants—*Allen & Gledhill.*

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NOTES.

Res Ipsa Loquitur.

In the recent case of *Westerhout* v. *Gumbleton* before the Hon'ble Mr. Justice Whitley, mention was made of the maxim or doctrine known as "Res ipsa loquitur" as applying to collisions or accidents on the public street or highway. The maxim "Res ipsa loquitur" does not apply to an accident on a highway. Those who go on a highway or have their property adjacent thereto and sustain personal injury or damage to their property lying beside it can only show a right to recover damages by affirmative evidence of fault in the person doing the damage. The fact of an accident raises no presumption [*Fletcher* v. *Rylands* (1866) L. R. 1 Ex. per Blackburn J. at page 286]. A man crossing the road is knocked down by a motor car. Merely to prove this shows no cause of action. The plaintiff must go further and specify some breach of duty on the part of the defendant, the car was driven too fast or was on the wrong side of the road or swerved or was not properly constructed or was overloaded, hence the accident, some fact imputing blame as the cause of the accident. It is as much the duty of foot passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot passengers [*Cotton* v. *Wood* (1860) 8 C.B. (N.S.) page 568 per Erle C.J. at page 571]. There must be evidence from which the jury "might reasonably and properly conclude that there was negligence" [*Toomey* v. *L. B. & S. C. Railway Company* (1857) 3 C.B. (N.S.) 146]. In the Scots cases of *Macaulay* v. *Duist* 1856 9 Dunl. (Ct. of Sess) page 245, *Walker* v. *Olsen* 1882. 9 R. (Ct. of Sess) 946 and others. The expressions upon this question might lead to uncertainty if considered apart from other cases in which they have been explained. A careful consideration of the Scots decisions shows that in these cases there was, in fact, evidence of negligence. It is now well settled that the maxim "Res ipsa loquitur" does not apply to collisions on the public streets and that in order to succeed the plaintiff must allege and prove negligence.

* * * * *

Daylight Saving.

We heartily congratulate Mr. R. Williamson on his reviving this subject which results in a Bill being introduced at the next Meeting of the Legislative Council to provide for 20 minutes day-light saving from the 1st January, 1933.

The Bill provides for advancing the clock in the Colony by twenty minutes in advance of Greenwich mean time.

Without curtailing present hours of work, it will shorten the time in the mornings before work is started, leaving a longer period of day-light after the day's work is finished for out-door recreation.

A change on similar lines has been of great benefit in England to workers of all classes without causing the dislocation in business which some people anticipated.

Even greater advantages may be looked for here where the time between the close of work and the setting in of darkness is too short in the case of so many workers for them to obtain the out-door exercise and recreation in daylight which is so materially beneficial to physical welfare.

* * * * *

Centralisation of Malayan Courts

We publish elsewhere in this issue the Memorandum read by Mr. E. D. Shearn on behalf of the F. M. S. Bar Committee criticising the rumoured centralisation of Malayan courts, at the recent meeting of the public bodies organised to discuss the proposed feature of decentralisation.

Since the reading of the above Memorandum, H.E. the High Commissioner has explained his views and intention as far as the Law Courts of Malaya were concerned.

In reply to His Excellency's criticism on the above Memorandum Mr. E. D. Shearn writes to the press as follows:—

"I read with interest the debate in the Federal Council published in yesterday's issue of the Malay Mail.

"It now appears that the question of improvements in the judicial organization of Malaya has been under consideration for some eight or nine months at least without any official intimation being given by Government to the bodies peculiarly concerned with and affected by that organization, *i.e.*, the various Bar Committees.

"The following passage in the speech made by His Excellency The High Commissioner in the course of winding up the debate is particularly noteworthy.

"'As there is very much misconception and as there has been very injudicious and premature publication of statements on this subject I have asked Sir William Murison to prepare a memorandum on the subject in such a form that I can place it before Their Highnesses.

"'When that has been done, and I have the views of Their Highnesses the Rulers I propose also to place this memorandum before the Bar Committees in Kuala Lumpur, Penang and Singapore in order that there may be no misunderstanding as to the nature of the criticisms offered by the Chief Justices on the existing organization.

"'Then I hope that these matters will be studied with care and perhaps by the time that Sir Samuel Wilson reaches us they may be ripe for discussion with him, and the views of the Bar Committees and others who are interested can be communicated to Sir Samuel Wilson.'

"It is to be observed that it is because of the very injudicious and premature publication of statements that the memorandum alluded to by His Excellency will be placed before the Bar Committees so that they can communicate their views to Sir Samuel Wilson. I pause to enquire whether but for the publication of the statements of which His Excellency complains the Bar Committees would have had vouchsafed to them before the visit of Sir Samuel Wilson the details of the proposals.

"It should be noted that it is not stated that it was intended in any event to give to the Bar Committees full information before the visit of Sir Samuel Wilson nor is there any reason to suppose that such was the intention of Government.

"Experience teaches one that it is wise to protest before there is a *fait accompli* and I personally realized a long time ago the futility of locking the stable door when the steed is stolen."

* * * * *

Restraint of Trade

A service agreement, as a rule, contains a stipulation restricting the employee, after the termination of his employment, from setting up a business or from being engaged in any business in competition with the employer within a certain area. At one time the attitude of the Courts was that all covenants and agreements in restraint of trade were altogether void and unenforceable (*Claygate* v. *Batchelor*, (1602) Owen, 143; 74 Engl. Reps. 961; *Clerk* v. *Taylors of Exeter*, (1685) 3 Lev. 241; 82 Engl. Reps. 670, Ex. Ch.). The rigidity of this rule was relaxed by the decision in *Nordenfeldt* v. *Maxim Nordenfeldt Guns and Ammunition Co.*, (1894 A.C. 535) where it was held that all restraints of trade *per se* were contrary to public policy but that, if they were reasonable in reference both to the interests of the parties concerned and to the interests of the

public, such covenants would be upheld. The correctness of this principle was affirmed in *Mason* v. *Provident Clothing Supply Co.*, (1913) A. C. 724 *Morris* v. *Saxelby*, (1916) A.C. 688.

A restriction which has for its sole object or one of its objects the preclusion of the employee from competing with his employer cannot be reasonable (*Morris* v. *Saxelby, supra*); *Atwood* v. *Lamont*, (1920) 3 K.B. 571). If the effect of the convenant is to prevent an employee from using the skill and knowledge acquired by him in his trade or profession during his service with the object of limiting competition then such covenant is illegal (*Sir W. C. Leng & Co.* v. *Andrews*, (1909) 1 Ch. 763.) An employee, however, is not entitled to disclose to others his employer's trade secrets (*Morris* v. *Saxelby, supra*). It is not necessary to consider whether or not there is a likelihood of the employee divulging trade secrets which come to his knowlcdge during his employment. It is sufficient if there are trade secrets a knowledge of which will naturally be acquired by him in the profession.

The matter has been carried further of late years.

Ropeways Ltd. v. *Hoyle* 35 T.L.R. 285 suggests that the Employer must shew either that he had trade secrets which the employee was in a position to use in a similar business to the employer's detriment, or that there is danger of solicitation of the employer's customers by the Defendant.

In *Fitch* v. *Dewes* 1921 A.C. 158 the House of Lords held that a covenant by a Solicitor unlimited in point of time but limited in space to a radius of seven miles of the Town Hall of Tamworth was good, as it did not exceed what was reasonably required for the protection of the covenantee. "A Solicitor's managing clerk must in the course of his duties acquire a knowledge of the affairs, documents and the dispositions of the clients of the business such as to give him a special equipment which he could if not restrained by contract use in obtaining employment as their legal adviser and that in this manner the goodwill of the employer's business might be impaired and perhaps destroyed." This seems to cover much the same ground as the "trade secrets" referred to in the *Ropeways* case and other cases.

In *Vincents of Reading* v. *Fogden* (1932 Law Times Newspaper Vol. 174 p. 68—not yet reported in the Law Reports) it was held that two principles were to be deduced from the series of decided cases on this subject: (*i*) a person seeking to enforce an agreement of this nature must show that it goes no further than is reasonably necessary for the protection of his business; and (*ii*) an employer must not take from the employee a covenant protecting the employer, after the cessation of the employment, from the competition of his former servant. In that case the defendant had acquired such qualifications as were necessary for fulfilling his duties before entering the plaintiffs' service and had not acquired any information of a confidential character. The restrictive clause was, therefore, not reasonably necessary for the protection of the plaintiffs' business, and was unenforceable and void; and it could not be served without making a new contract between the parties.

Coming to cases in this Colony, in 1902 it was held that a covenant to the effect that the employee should not take any employment nor establish any business in the Straits Settlements or Native States during or after the term of employment either directly or indirectly in opposition to the employer without permission was not too wide (*John Little & Co.* v. *Wallace*, 7.S.S.L.R. 53). The Plaintiff Company was a limited Company carrying on business as shopkeepers selling various kinds of goods. The defendant was employed as "working watchmaker and manager of the department comprising watches, jewellery etc." in the plaintiffs' shop in Singapore. The Plaintiffs claimed an injunction restraining the defendant from carrying on business as watch-maker in Singapore. It was held that the restraint must be construed as referring to the watchmaking business in which the defendant was engaged. But it is very uncertain if this decision would be followed today in view of the later cases mentioned in this Article.

P. E. Crahay v. *J. Conrad* (Singapore Suit No. 529 of 1921; unreported) raised the question of whether in a contract of service a restraint of trade imposed upon the defendant was reasonably necessary for the protection of the plaintiff's interests. The material clause prov ded that in the event of any breach of the contract before its expiration "for reasons independant of my (*plaintiff's*) desire" the defendant would not for a period of not less then 3 years after such breach set up a practice in Singapore. It should be noted that both parties were medical men of Belgian nationality, the plaintiff being a physician and the defendant a surgeon. In the course of the Judgment Mr. Justice Barrett-Lennard commented that "doctors, unlike solicitors, architects, accountants, and any other professional gentlemen, depend for their success exclusively upon their own skill and learning. There are no famous firm names in the realm of medicine. Each doctor uses his own particular title either alone or in combination with that or those of his partner or partners. On a sale of a practice the outgoing doctor is invariably required to dedicate an appreciable time to the introduction of his

successor. The price paid has strict relation to the personal nature of the profession" and went on to say, later, "Now the relation between the surgeon and the physician is in some respects like the relation which subsists between the solicitor and the barrister. The two, indeed, are not to be looked upon as competitors. One is really the complement of the other. For this reason the defendant may not really interfere with the plaintiff to any appreciable extent. But supposing the man, who is primarily a physician, nevertheless practises surgery, as the plaintiff no doubt does. The pure surgeon is not in a situation to entice away the patients of his fellow practitioner. Therefore I do not think that the plaintiff can be robbed of his connections assuming him to be both a physician and surgeon."

In *P. M. Framroz* v. *N. R. Mistri* (Singapore Suit No. 560 of 1924) reported elsewhere in this issue of the Journal the Court of Appeal unanimously decided that, where the employee acquired no knowledge of trade secrets during the term of his engagement and where the nature of employee's work did bring him into personal contact with the employer's customers such as would place him in a position to detach them, the restriction to prevent the employee from carrying on business or being concerned in a business similar to that of the employer was unreasonable. The Court of Appeal and the trial Court found, on the evidence, that there were no trade secrets in the manufacture of aerated water that required protection and that the position of the defendant as manager of the plaintiff's business was such that he could not use his influence over plaintiff's customers to the prejudice of the plaintiff. It is to be noted that in this case the defendant through his solicitors had already given the plaintiff before writ was issued an unconditional undertaking not to solicit the plaintiff's customers.

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Malayan Legislation

Mr. Justice Terrell's book has certainly done immense good since its publication and we find an example in the remarks made by Mr. G. S. Hellings the first Magistrate, Ipoh when Col. C. L. Prior appeared before him charged with the Road Transport offences.

The accused stated that he fullv appreciated the fact that the police officer had received instructions from those above them to deal strictly with all road transport offences. Col. Prior also said that he believed Magistrates, too, had been given similar instructions.

Mr. Hellings, finding the accused guilty, said that Magistrates never took or received instructions from anyone, and that the instructions imputed to the Bench by Col. Frior had never been received. If any administrative officer had issued such instructions to him, he would promptly report the matter to the Chief Justice.

Mr. G. R. Livett, officer in charge of the Traffic Branch Ipoh, denied the allegation made by the accused against the Police Officers.

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LEGAL PERSONALIA AND NEWS.

His Majesty The King has appointed Mr. Robert William Lyall-Grant, Puisne Judge, Ceylon, to be Chief Justice of Jamaica, in succession to Sir Fiennes Barrett-Lennard formerly a Judge of the Supreme Courts of the Straits Settlements and Federated Malay States

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Members of the legal fraternity will be glad to hear that Mr. and Mrs. Roland Braddell are now staying at 6685 Yucca Street, Hollywood, where they are spending their holiday. In a letter just received by the Editor, Mr. Braddell says, "I have just opened and run through the Malayan Law Journal. I do most heartily congratulate you and hope that this Journal will be a permanency for it is very badly needed. It's a splendid thing you have set your hand to....."

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It is with pleasure that we announce the addition of Mr. C. D. Hogan of the Penang Bar to our Advisory Editorial Board. Mr. Hogan is a senior member of the Bar and a highly respected member of the community. Mr. Hogan's wide experience and sound knowledge of the law will prove valuable assets to our Journal.

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Mr. Ismail Khan, Barrister-at-Law was on the 27th September last admitted to practice as an Advocate and Solicitor of the Supreme Courts of the Straits Settlements.

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At the Annual General Meeting of the Johore Bar held on Saturday the 24th September last the following gentlemen were elected members of the Johore Bar Committee for the ensuing year 1932/1933:

M. Ismail, Esq. (President); J. Laycock, Esq.; S. C. Goho, Esq.; D. G. Osborne-Jones, Esq.; H. H. Norris, Esq.; N. N. Leceister, Esq. (Hon. Sectretary).

Mr. J. H. B. Will, of Messrs. Gibb & Co., Advocates and Solicitors, Ipoh has returned from leave with Mrs. Will.

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Che Mohamed Nassir bin Haji Salleh, Assistant Registrar of the Supreme Court, Johore Bahru, has been appointed by His Highness the Sultan in Council as Assistant Official Administrator for the State of Johore.

THE CLERK AND THE SHIRT.

If he be correctly reported, we think the clerk to justices who reproved an official witness for appearing in court wearing a tennis shirt, open at the neck, may find it difficult to deal with the rejoinder of the Secretary of the Civil Service Clerical Association.

The newspaper report states that the witness, who was a civil servant, was told: "This is a Court of Justice, not a sports meeting. I shall report your unconventional attire to the Ministry of Labour."

The reply of the Association's Secretary contains this passage: "I have always understood that the duty of a Police Court Clerk was to advise the Magistrates on points of law and not defendants or witnesses on the clothing they shall wear."

The clerk may have been expressing the views of the Magistrates, and by their wish. Even so, however, it is doubtful whether either Magistrates or clerks are entitled to object to the costume or appearance of a witness merely because it seems to them unsuitable to the occasion. We may dislike modern styles of dress; we may secretly agree with the clerk; but unless Judges of the High Court set the example of prescribing what may or may not be worn in court, we think it well that lesser people should refrain—*Justice of the Peace.*

GREAT TEMPTATION OF A MANAGING CLERK.

He tells a very human story of a great temptation when he was a solicitor's managing clerk, during the winding up proceedings in connection with the West London Commercial Bank. He had taken securities worth £30,000 from the bank to the office, but as the office was closed he took them home, buying a revolver and ammunition on the way. It was the Thursday before Good Friday and everyone would be away from the office until the following Tuesday. In the middle of the night he awoke and could not sleep.

"Thoughts came instead. At first as a joke the idea arose in my mind that if I were to bolt with the money no one would move in the matter for several days.....Enquiries might be made on Tuesday, but probably nothing would be found out before the Wednesday; certainly I should have four and probably five days' start—possibly more. No telephones existed (it was in the eighties), nor the nasty wireless which caused Crippen's capture, and no telegraphic pictures could be sent. I laughed at the joke....."

He describes his night thoughts of the glorious possibilities of thirty thousand pounds. When he slept, lovely dreams came to him of homes in foreign lands with beautiful young women, flowers and song. "Next morning I awoke with a headache and promptly came to the determination to behave properly and get rid of the beastly bonds as soon as possible...." And he did. But he had learned a lesson in charity: for when I hear of people yielding to temptation, I feel rather sympathetic: it is so easy to be fiercely virtuous when you are not tempted."
Justice of the Peace.

IN LIGHTER VEIN.

Those Maxims.

The following question was propounded in a bar examination: "If a goat kept by A manages to escape from the inclosure, and goes upon the land of B, demolishing shrubs and flowers, what are the rights of the parties?

To which one aspirant answered: "The goat would be saved harmless; but its master would be liable to a suit for damages. This is because the law is no respecter of persons."

The Shock of War.

Two old grads, reunited after many years, had arrived at the point when an exchange of confidences becomes inevitable.

"Did the war hit you, too, old man?" asked the first.

The other nodded and looked away quickly.

"Son," pursued the first gently.

The other shook his head dolefully.

"No, my wife's first husband."

Commonsense.

It is always the true stories that get me into trouble, but if the following has an unpleasant sequel in the form of a stern letter from the Bar Committee, I shall have to console myself with the

knowledge that in earning legal disapproval I am in very distinguished company. At the Singapore Assizes one day last week a local advocate used just these very words: "Gentlemen of the jury, His Lordship will tell you what criminal breach of trust is, but I will explain it to you in a simple and commonsense way."

"Do you eat grass?"

A prisoner at the General Sessions, Melbourne, said that he gave all he earned to his mother.

Counsel:—Do you drink? No.

Do you smoke?—No.

Do you go to dances or theatres?—No.

Judge Winneke: Do you eat grass?

Prisoner (wonderingly):—No.

Judge (smilingly): Then you are not fit company for man or beast.

PUBLICATIONS RECEIVED.

The Solicitors' Journal. Vol. LXXVI. Nos. 32—35. 29 Beams Buildings, London, E.C. 4. Published Weekly. Single Copy One Shilling.

All India Reporter. Parts 140 and 141. August and September, 1932. Nagpur, India. All India Reporter Press—published monthly. Subscription Rs. 36—unbound. Rs. 48—bound. Carriage Extra.

The Madras Law Journal. Vol. 63. Parts 1—8. Published Every Thursday. The Madras Law Journal Office, Mylapore, Madras. Annual Subscription, Rs. 12 for India. 21s. Foreign.

Indian Cases. Vol. 139, Part 1. Law Publishing Press. Lahore—Punjab (India). Subscription —India per part Rs. 8. Foreign One Guinea.

Bombay Law Journal. Vol. X, No. 4. September 1932, Bombay: Union Press. Annual Subscription Rs. 10 for India, Rs. 13 Foreign. Single copy Rs. 2.

Notable British Trials: Trial of John Watson Laurie (The Arran Murder). Edited by William Roughead. 1932. Illustrated. Published by Butterworth & Co. (Publishers) Limited, London. Obtainable from Butterworth & Co. (India) Limited, Calcutta. Price Rs. 6.8. per copy.

Straits Settlements Government Gazette. Vol: LXVII Nos. 48—70. Published every Friday. Singapore. Government Printing Office. Annual Subscription $10.

Federated Malay States Government Gazette. Vol. XXIV Nos. 15—20. Kuala Lumpur. Annual Subscription $10.

Johore Government Gazatte. Vol. XXII Nos. 18—27. Johore Bahru. Annual Subscription $10.

F. M. S. CRIMINAL PROCEDURE CODE (AMENDMENT).

The draft bill amending the F.M.S. Criminal Procedure Code which was published in the Supplement to the F. M. S. Government Gazette of the 13th August, 1932, and which has been subsequently passed into law certainly calls for comment. Attention is particularly directed to Clauses 6 and 7 of the amending enactment.

We must confess we are unable to find any precedent in which a draft bill published for the general information of the public could have been passed into law the very next month after its appearance in the Gazette.

It is common knowledge that in the Colony a bill will have to pass through three successive stages of reading before it becomes law thereby giving the public ample opportunity of offering any reasonable criticism.

Clause 6 of the amending Enactment which repeals sub-section (ii) of Section 113 (corresponding to S. 121 (2) of the Straits Settlements Criminal Procedure Code) reads:—

> "(ii) When any witness is called for the prosecution or for the defence, including the accused if he tenders himself as a witness in his own defence, the Court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this chapter and may then, if the Court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof; and such statement may, notwithstanding the provisions elsewhere contained in the Straits Settlements Evidence Ordinance, 1893, be used to impeach the credit of such witness in the manner provided by the said Ordinance."

This amendment offends against one's sense of justice. It appears to permit "confessions" not made to a Magistrate to be put in evidence to impeach the credit of the accused person if he gives evidence.

Under section 162 of the Indian Criminal Procedure Code on which are based the corresponding sections of the F. M. S. and the S. S. Procedure Codes the accused may cross-examine and impeach the credit of any prosecution witness on the statement made by such witness to the investigating officer, but the prosecution may not use any statement made by the accused or a defence witness during the course of an investigation for the purpose of impeaching his credit.

The corresponding sections of the F.M.S. and the S.S. Criminal Procedure Codes (Sections 113 and 121 respectively), however, go a step further and allow the prosecution to impeach the credit of a defence witness on a statement made by him to the investigating officer but they confer no right on the prosecution to make any use at the trial of such statement made by the accused.

The amending Enactment does away with the privileges so far attaching to the statement of the accused person. The learned Legal Adviser in his Objects and Reasons says *inter alia*—"It is considered that the present law unduly restricts the prosecution and may even result in a miscarriage of justice."

We agree with the learned Legal Adviser but it is our opinion that the remedy devised is worse than the disease it is proposed to cure. We venture to think that this provision is going to be a prolific source of injustice.

The law relating to confessions before Magistrates is laid down in sections 25 and 26 of the Evidence Ordinance and section 115 of the F. M. S. Criminal Procedure Code which corresponds to section 123 of the S. S. Criminal Procedure Code. As is well known in recording confessions, the magistrate has to take many precautions in order to comply with the requirements of these sections. A confession which is improperly taken is inadmissible in evidence. It may be noticed that in *Rex* v. *Lim Ah Seng*, 1 Mal. L. J., 12 it was held that in order to render a confession admissible in evidence the statement must be volunteered and not merely voluntary. The rules and form prescribed under the Criminal Procedure Code for the recording of confessions by an accused person must be strictly adhered to and failure to follow the procedure laid down will vitiate the confession or statement *Rex* v. *Lim Ah Seng, (supra)*.

Best in his work on the Law of Evidence gives a very lucid exposition on the principles which should be observed in the taking of confessions. At pages 472 and 473 he says—

> "Self-harming evidence is not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility, that the party against whom it is adduced must have supplied it *voluntarily*, or at least *freely*. It is an established principle of English law that every confession or criminative statement ought to be rejected, which has been extracted by physical torture, coercion, or duress of imprisonment; or which has been made after any inducement to confess has been held out to the accused, by or with the sanction, express or implied, of any person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected with that charge. But in order to have this effect, the inducement thus held out must be in the nature of a promise of favour or threat of punishment; *i.e.*, it must be calculated to convey to the mind of the accused that his condition, so far as it may be affected by the charge against him, will be rendered better or worse by his consenting or refusing to confess. If, therefore, it appears that the accused was urged to speak the truth on moral grounds only, the confession or criminative statement will be receivable; as it also will be, when the supposed influence of an illegal inducement to confess may fairly be presumed to have been dissipated before the confession by a warning from a person in authority not to pay any attention to it."

The prosecution have always found the strict rules governing confessions irksome. It will be readily seen that the amendment in question has succeeded in circumventing these troublesome though necessary safeguards which relate to confessions before magistrates. One effect of this legislation as we see it, is that it confers upon a statement made by the accused to an investigating officer, a statement which may even have been extorted from the accused, the same evidentiary value as is possessed by a confession to a magistrate.

We have nothing but praise for the Police of the country as a whole but at the same time we cannot disregard certain cases in which there have been charges of extortion of statements and confessions. One of the leading advocates of the F.M.S. whose opinion we sought with regard to these amendments informs us that a Police Officer once confessed to him that he had beaten witnesses on three occasions in order to make them speak. We consider that the accused person requires the same protection against the Police as he gets in India. In fact the necessity of safeguards so far as statements of the accused persons are concerned is greater in this country than in India by reason of the heterogeneous nature of the population here and the language difficulty. The Investigating Officer cannot be expected to know all the languages spoken here. The constables who are usually employed by the Investigating Officers to interpret what is said by a non-English speaking person interpret into Malay what is said by the person interrogated and the Investigating Officer puts down in English what is said to him in Malay. It is obvious that even if the interpreter and the Investigating Officer do not wittingly add to or substract from the statement made by the accused there is every likelihood of the statement acquiring through the process of translation such colour and meaning which the accused never meant to give and which may at the trial turn out to be most damaging to his case. On the other hand one can imagine the plight of the accused if either the Investigating

Officer or the interpreter happens to be an unscrupulous person and determined to obtain a conviction. It should be noticed too that the statements referred to in the amending section are not to be signed by the accused and it is extremely unfair to the accused that he should be cross-examined by the prosecution on such a statement.

Clause 7 enacts:—

116A. "Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time forward the accused to such Magistrate.

"The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be forwarded to a Magistrate having such jurisdiction.

"A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing."

This amendment is also open to objection. In sub-section (ii) any Magistrate is given power to detain under arrest any person for a period up to 15 days, although the Magistrate has no power to try the case.

There are a number of persons gazetted as Magistrates in the Federated Malay States and it is highly dangerous to vest them with all and sundry the power to authorise a person to be kept in custody for so long a period as 15 days.

Furthermore, the amendment requires serious consideration. If Section 3 of the amending Enactment is read strictly the result would be that once a special order has been made under Section 116A there is no limit imposed as regards the period during which a Police Officer may detain a person arrested without warrant.

The new section 116A. is defective in that it does not prescribe what is to happen at the end of the 15 days nor does Section 28 as amended make the requisite provision. Section 28 (ii) empowers a Police Officer once a special order has been made under Section 116A. to determine what is the reasonable period and there is *no limit* to this period under Sub-section (iii) as amended.

The reason for introducing Section 116A. appears to be to provide for further detention in a proper case of persons suspected of having committed an offence. This section is said to have been taken from the corresponding Indian section.

It is true that our Criminal Procedure Code is based upon the Indian Criminal Procedure Code. But it does not follow that each and every amendment made in India should be introduced in Malaya. The Legislators in India may have their own reasons for making any amendment which may be deemed necessary to them.

We also observe from the Objects and Reasons for the amendments that a similar bill is to be introduced in the Colony. We most respectfully urge the respective Bar Committees of the Straits Settlements not to allow such amendments to pass unchallenged.

We shall be glad to receive, and give publicity to, the views of the members of the Bar on these Amendments.

GAMING AND WAGERING CONTRACTS.

The plea of "gaming or wagering contract" comes before the Courts at irregular intervals. Such contracts of course are bad under Sec. 6 of the Civil Law Ordinance.

The favourite forms of speculation in the Straits Settlements are dealings in stocks and shares, dealings in foreign exchange and dealings in rubber. Tin does not seem to be such a good speculative medium, though speculation in tin is by no means unknown in Malaya.

When there are heavy market fluctuations in, *e.g.*, rubber—it is probable that somebody will be a loser. When it is the merchant who is the big loser (rather than the dealer) there is always a chance of his setting up the plea that the contract is a gaming or wagering contract. Dealers (such as brokers) rarely set up this plea since such a plea if successful would strike at the root of their businesses. Even in the case of a merchant with a taste for speculation if it is unknown that he is the sort of man who sets up

this sort of plea, it is bound to hamper his activities. It follows that as a rule this plea is only set up by people who are in some financial difficulty. At times of severe fluctuations in the market, little epidemics of this plea are quite usual. They start with a brave show of fight and generally one or two actions will go on to trial but after the first trial or two they almost invariably split upon the same rock namely that it is necessary to show that both sides are gambling, not only the merchant but the dealer also.

In Singapore Suit No. 167 of 1907—*The Mercantile Bank of India Limited* v. *A. R. M. M. Ramasamy Chitty* the Plaintiffs claimed against the Defendant for the price of foreign exchange sold by them to the Defendant. The Defendant pleaded gaming or wagering contract. In a short written judgment which is still in the record Fisher J. decided "I am clear that so far at any rate as the Plaintiff Bank is concerned such a contract as this is not one by way of gaming or wagering." Almost all the authorities on the law are referred to in the case of *Syn Thong & Co.* v. *Tong Joo (Hoo) & Co.* reported in 1929 S.S.L.R. at p. 39. That case concerned forward contracts for the purchase and sale of rubber. The matter was fully argued and it seems to have been generally agreed that most of the law on the subject is satisfactorily set out in the case of *The Universal Stock Exchange Limited* v. *David Strachan* 1896 A.C. p. 166. In the words of Cave J., approved by the House of Lords "to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it"; and it is almost always very difficult to prove that the other side were gambling. But it has to be borne in mind that the fact that the purchaser has the option of really taking delivery of the stock, shares, foreign exchange, or rubber as the case may be does not necessarily prevent the transaction being an agreement for gaming or wagering. (*In re Gieve* 1899 1 Q.B.794). Recently there has been another little epidemic of foreign exchange contract cases in Singapore in which the "gaming or wagering" plea has been advanced in defence; but exchange is always purchased from banks and it is very difficult to prove that a Bank has been gambling. One has heard some expressions of opinion that it is unfortunate that all these cases have collapsed before Judgment, thereby preventing the delivery of an authoritative judgment which would be available as a precedent. The writer does not take that view. The law on this subject is already fairly completely reviewed in the local rubber case mentioned above (*Syn Thong & Co.*) and there is no difference in the law applicable which arises merely because the contracts concerned in one case rubber and in the other, foreign exchange. The question whether a contract is or is not a gaming or wagering contract is properly not a question of law at all but a question of fact which must be decided on the circumstances of each particular case. J. L.

PROPOSED APPOINTMENT OF ONE CHIEF JUSTICE FOR MALAYA.

As a matter of general interest, the full text of a Memorandum read by Mr. E. D. Shearn on behalf of the F.M.S. Bar Committee at a conference of Delegates from Malayan public bodies on the proposed policy of decentralisation in the Federated Malay States is reproduced below.

The Federated Malay States Bar Committee as such has no political views but we conceive it to be our duty to make representations whenever any proposals are made which will or which may have far reaching effects involving among other things the administration of law and justice in the Federated Malay States. We have learnt that in the train of the political and administrative changes with which this meeting is primarily concerned there has followed a proposal for the centralization of the Courts by the appointment of one Chief Justice stationed in Singapore who shall be Chief Justice of the Colony and of the Federated Malay States.

As so often happens those intimately concerned have not been consulted in advance and the opinion of bodies well qualified to offer suggestions or warnings has not been sought; that is to say the proposals to which I refer have not been submitted to the Bar Committees of Singapore, Penang and the Federated Malay States for consideration and comment.

We are in the dark as to the exact limit to which the proposals extend. It is not known whether the suggestion is merely that which I

have already stated or whether in fact fusion of the Courts of the Straits Settlements and of the Federated Malay States is aimed at.

My Committee has considered both of these suggestions and after full deliberation we are unanimously of opinion that they are undesirable in the extreme and are open to the very strongest objection.

I will take first the matter of the fusion of the two Courts into one Supreme Court of Malaya under a single Chief Justice.

To understand the nature of the criticism from a juristic point of view I deal with the present Courts which it may be proposed to merge and I suggest that a perusal of the matters which I set out is sufficient to show the juristic impossibility of merging these Courts.

The Supreme Court of the Straits Settlements.

In the Colony the fount of justice is His Majesty the King and a Judge of the Supreme Court when sitting in his Court represents the person of His Majesty.

The Court is a Royal Court of Record established by Royal Charter of Justice though re-constituted by local Ordinance. It has practically all the powers of the Supreme Court of England; and has inherent in it those great powers and duties with which the constitutional and common law of England has endowed the Supreme Court of England. Thus, for instance, it can (and does when necessary) issue the prerogative writs of mandamus, prohibition and quo warranto. Its process runs in the name of His Majesty the King.

The basis of the law administered in the Colony is the common law of England as it stood in 1826 and as extended by the Civil Law Ordinance. The rules of equity are applied fully by the Court save in so far as their application is restricted by the rules of evidence contained in the Evidence Ordinance.

The Supreme Court of the Federated Malay States.

In a Malay State the fount of justice is the Ruler. The Supreme Court of the Federated Malay States is the creature of the joint enactment of the Rulers of the four States in Council, It has no powers save such as are by Enactments conferred upon it and only such inherent powers as are necessary to the proper administration of such justice as it is empowered to administer.

Its process runs in the name of the Judge under his hand and the Seal of the Court.

The basis of the law administered in the Federated Malay States is Mahomedan law tempered by Malayan custom, that is to say, the Hukum Shara, the Kanun and the Malayan Hukum Adat. All other laws are (or should be) statutory.

How two such entirely different Courts and jurisdictions are to be merged into a hybrid I respectfully fail to see.

It is obviously anomalous that there should be one Court for several countries politically distinct and with different laws. Imagine a single court for England, Scotland and Northern Ireland.

It is to be remembered that if the proposal goes through it must follow that there will be one Bar with advocates and solicitors who will practise up and down the country without being separately admitted in the Federated Malay States and the Straits Settlements.

This will save the pocket of members of the United Bar of Malaya but I seriously doubt whether it will be in the interests of the public for a practitioner trained, for instance, in the Straits Settlements to follow his profession in the Federated Malay States, with the laws of which he may be only slightly acquainted.

In the Federated Malay States the Bar and the public, in my humble opinion, today suffer from a lack of specialists and any policy is to be deprecated which will tend to cause practitioners to be to an even greater degree than now, jacks of all trades and masters of none.

The Singapore Bar Committee discussed this suggestion at a meeting on the 30th January 1932 and were unanimously of the opinion that the proposal to have one Supreme Court for Malaya was unfeasible and open to the strongest criticism on both juristic and political grounds.

I come now to the other proposal namely that there should be centralization by the appointment of one Chief Justice of the Colony and of the Federated Malay States.

This is a change but it is no reform.

There is at present in existence a measure of inter changeability of the Judges and this proposal will give no remedy for whatever shortage of Judges there is nor is it to be anticipated that it can make the work of the Judges, the Bar or litigants any the more convenient. At present discussions take place between the Chief Justice of the Straits Settlements and the Chief Justice of the Federated Malay States about judges going away from their fixed station to give assistance elsewhere or to make up a Court of Appeal and each Chief Justice frequently considers the objections of the other unnecessary, but in my view the Chief Justice on the spot is in a better position to judge of the calls upon the time of his Puisne Judge or Judges than the other Chief Justice. If there is a Chief Justice for Malaya stationed in Singapore I see the requirements of the Federated Malay States as regards allocation of judicial time being disregarded. The absence of judges and in consequence the impossibility of proceeding with litigation directly affects the public. I remember a time when Seremban had no judge but the Court work was done spasmodically from Kuala Lumpur.

I doubt if any one who remembers the period will advocate its repetition.

Supervision could not properly be had at the hands of a Single Chief Justice stationed in the Colony. It is of the greatest importance that the Judicial Officer in prime control of the Courts of the Federated Malay States should have a knowledge of local laws and court procedure of the manners and customs of the litigants peculiar to the Courts of the Federated Malay States. There is no security that a Chief Justice stationed in Singapore will have that knowledge and if he primarily resides in Singapore he will not acquire it. The qualification and experience which are necessary for the Chief Justice of the Colony do not of themselves fit him to be Chief Justice of the Federated Malay States.

For the successful allocation of judicial time in the Federated Malay States a knowledge of the geographical conditions is at times essential. For the encouragement and development of our system of law and practice it is highly desirable that the Chief Judicial Officer of the Federated Malay States should be easily accessible to the other Judges in the Federated Malay States and to the Bar. The fact that our system of law and practice is not well settled and well established makes it all the more essential that there should be personal and particular attention to the problems from day to day arising. With one Chief Justice stationed in Singapore his personal and particular attention is not to be expected to the same degree as with a Chief Justice of the Federated Malay States stationed in the Federated Malay States and concerned only with the affairs of the Federated Malay States.

As a measure of economy the suggestion is negligible. There would be any way a Puisne Judge in Kuala Lumpur in place of the Chief Justice and the economy effected in money would be of a few hundred dollars a month. In the result there would be no economy. An ill organized assize or Court of Appeal would beyond all question effectually nullify the small saving effected by the abolition of the post of Chief Justice of the Federated Malay States. While the lack of proper supervision to be anticipated if the suggested change were given effect to would be dearly bought if in fact some three hundred dollars a month were saved. If the prime consideration is economy I would quote the words of Professor Sir W. S. Holdsworth when dealing recently with the question of Judges' salaries.

> "But a good thing is never cheap and to pay sufficient to get a good thing is often the truest economy for thereby expensive disasters are avoided."

Those of us who are well acquainted with the administration of law and justice in this country can not urge too strongly upon those responsible for the destinies of these Federated Malay States to be at pains to safeguard the vital work performed in our Courts and we warn them as clearly as we can against ill considered and doubtful experiments which have not been submitted to bodies well able to judge of them and which when considered are condemned by them.